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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 6th MEETING

Held at the Austria Center Vienna,
on Friday, 5 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 2.50 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (continued) (A/CONF.152/C.1/L.31)

1. Mr. WALL (United Kingdom) said that article 4 as a whole caused his delegation considerable concern. The use of the word "customer" in paragraph 1, and nowhere else in the Convention, was a particular problem. While he was reluctant to suggest that the term should be defined in the Convention, it was important that there should be a clear understanding of what it meant in that particular context. The people who might present a document to the operator, or require one from him, included carriers, either delivering or collecting the goods, and persons with some form of interest in those goods at the first or last stage of their international carriage. While such people might have no contractual relationship with the operator, they would wish to be sure, on handing over an item to him, that he would provide a receipt indicating that the goods had been accepted by him and were in good condition. The Committee might wish to consider whether the term "customer" was appropriate for that purpose.

2. He had found, in seeking to incorporate into article 4, his delegation's proposal in document A/CONF.152/C.1/L.31, that there was a clash between the notion of a carrier or other person with an interest in the goods and the notion of customer as used in the article. Under subparagraph (a) of article 4 (1), the customer would present a document which was to be signed by the operator. That document would identify the goods and - if the text suggested by the United Kingdom was incorporated into the article - would also indicate that they were involved in international carriage. The introductory wording of article 4 (1), however, gave the operator the option of acknowledging his receipt of the goods by signing that document or of himself issuing the signed document described in subparagraph (b); the latter document might also acknowledge that the goods were involved in international carriage. But under article 4 (2) the operator, by not acting in accordance with either of the subparagraphs of article 4 (1), would be the subject of a rebuttable presumption that he had received the goods in apparent good condition. That provision caused his delegation great difficulty. Moreover, it could see no justification for the exception set forth in the second sentence of paragraph 2, and suggested that it should be excluded from the draft.

3. He believed that the amendment which the Committee had made to paragraph 3 at the previous meeting did the paragraph a major disservice and, through it, a disservice to the article as a whole. Regarding paragraph 4, which closely followed the wording of article 14 of the Hamburg Rules, he suggested that a comma should be inserted between the word "printed" and the words "in facsimile". It was unfortunate that it had been omitted from the Hamburg Rules.

4. In his delegation's view, article 4, and paragraphs 1 and 2 in particular, compressed too many ideas together. The documents to which the article referred would be highly important and the Convention should make it very clear, possibly by adding further details, what their true intention was.

5. The CHAIRMAN suggested that the Committee might discuss the United Kingdom proposal in document A/CONF.152/C.1/L.31 and, if its substance was approved, seek a way of adapting it to article 4.

6. Mr. WALL (United Kingdom) said that he hoped he himself would be able to formulate his delegation's proposal in such a way that it would be amenable to incorporation into article 4. He would continue to work towards that end.

7. Mr. LAVIÑA (Philippines) said that, as it stood, paragraph 1 of article 4 was confusing and would need some drafting changes. His delegation was also concerned about the use of the words "rebuttably presumed" in the first sentence of paragraph 2. In the second sentence, did the phrase "no such presumption applies" mean that there would be no such rebuttable presumption, in other words that there would be a conclusive presumption, or no presumption at all? His delegation endorsed the view expressed by the representative of the United Kingdom on the use of the word "customer". In previous transport conventions and in other parts of the present draft the more technical term "interested party" was employed. He approved the suggestion that a comma should be inserted in paragraph 4 between the words "printed" and "in facsimile".

8. Mr. HERBER (Germany) said that his delegation also felt great concern about article 4. Paragraphs 1 and 2 contained a great number of ideas, not all of which had been clearly expressed. Paragraph 2, for example, dealt with the question of presumption: if the operator did not act in accordance with either subparagraph (a) or subparagraph (b) of paragraph 1, there would be a presumption that he had taken the goods in charge in apparent good condition. What happened, however, if he did issue a document saying that he had received the goods in good condition? Would that create a presumption and would it be a rebuttable one? The answer to both questions could only be in the affirmative. The document in question would not be a negotiable instrument and therefore any presumption which it created must be rebuttable. It was not sensible to imply, as paragraph 2 seemed to do, that, if the operator acted in accordance with subparagraphs 1 (a) or (b), his action would raise no presumption at all. It could be argued that, in that case, the presumption was self-evident but that was a highly dangerous approach.

9. He felt that the reason for the lapse lay in the changes that had been made in the draft during its elaboration. Originally, in the Hamburg Rules and in the UNIDROIT text, the rule on presumption had been restricted to someone who had the goods in charge and to the case where the document was issued, and it dealt only with the kind of presumption which the document raised. Paragraph 2 of the Commission's draft had turned the rule around and made failure to issue a document constitute a presumption that the goods had been received in good condition. The main point, what kind of presumption the document created, had been dropped. The text was unclear and needed further consideration.

10. Mr. ABASCAL (Mexico) said that the representative of the United States of America had agreed that his delegation's proposal for paragraph 4 (A/CONF.152/C.1/L.10) might be dealt with by the Drafting Committee. However, the omission of the substantive point implied by the words "if not inconsistent with the law of the country where the document is signed", which appeared at the end of article 4 (4) of the Commission's draft, could not be dealt with by the Drafting Committee.

11. The CHAIRMAN said that the discussion of article 4 in the First Committee had not been concluded. Moreover, what had been said since the United States had made that suggestion had shown that the situation in regard to electronic writing was not as simple as had appeared at first sight.

12. Mr. RUSTAND (Sweden) said he looked forward to studying the United Kingd anticipated reformulation in writing of its proposal in document A/CONF.152/C.1/L.31, with a view to the consideration of its incorporation in article 4. He would reserve his final comments on the article until he had s the new proposal. His delegation would have no objection to the replacement word "customer" by a more suitable term. As far as the rule of presumption w concerned, he had compared paragraph 2 of article 4 of the draft Convention w the text that had been before UNCITRAL at its twenty-second session, and had that the second sentence of the paragraph had been added at that session, alt the sessional report (A/44/17) did not show the reasons for the addition. Hi recollection was that it had been considered unfair to require an operator wh merely transferred goods from one means of transport to another to take the documentary action for which the article called, and still more unfair if fai to do so were to create the presumption in question. That was the reason for exception expressed in the second sentence. He endorsed the suggestion that comma should be inserted in paragraph 4 between the words "printed" and "in facsimile" and wished to reserve his position on the very interesting and dif point raised by the representative of Germany.

13. Mr. MORAN (Spain) said that his delegation approved article 4 as it sto was confident that the doubts expressed about it could be solved by looking Convention as a whole. The representative of Germany had believed that para would raise a presumption. According to the Spanish legal system, and perha others, the presumption would be that at the time of acting the operator had exercised reasonable diligence. If the customer presented a document to the operator which the latter signed, then the goods would be presumed to have b received in good condition, as evidenced by the signed document. That presu would exist, but - as could be deduced from article 6 - the operator might b to show that damage to the goods had been caused by another person's fault, which case he would not be held liable solely by virtue of his signature.

14. The second possibility offered by article 4 (1) was that the customer d present a document but waited for the operator to provide one; the operator then be able to check the goods and in reasonable time issue a document whic created a presumption as to the circumstances in which the goods had been fo whether or not anything had happened to them while in the terminal. The thi possibility was where the operator neither issued a document nor signed that to him by the customer, which was the case to which paragraph 2 referred. A there would be a presumption, unless proved otherwise, that the goods had be handed over in good condition; it was logical that the presumption should f only after it had been demonstrated that the goods had not been received in condition, as reflected in the content of article 6.

15. His recollection regarding the second sentence of paragraph 2 was the s that of the Swedish representative. He believed it logical that no presumpt should attach to the operator in the case envisaged.

16. Mr. ZHAO Chengbi (China) said that, in his delegation's view, article 4 drafted was fair to both the customer and the operator. The operator had bo right and a duty to provide a signed receipt acknowledging the condition of goods. To a certain extent his delegation endorsed the views of the represe of the United Kingdom about the use of the word "customer", but it considere the term could be interpreted as meaning the person who requested the operat give a receipt for the goods. Such a request was reasonable and the custom should have the right to make it. Article 4 (2) was also fair and reasonab Subject to minor drafting changes, article 4 was acceptable to his delegati

17. Mr. TARKO (Austria) said that his delegation was satisfied with article 4 as it stood despite its complexities. The only problem he found was that the presumption referred to in paragraph 2 covered not only paragraph 1 (b) but also paragraph 1 (a), which did not require the operator to mention the condition of the goods. He should not therefore be penalized by a presumption in the latter case that the goods had been received in good condition.

18. Ms. SISULA-TULOKAS (Finland) shared the objection raised by the representative of Austria.

19. Mr. WALL (United Kingdom) said that one essential idea appeared to be missing from both paragraphs 1 and 2, namely that the operator had in fact received the goods. Some of the problems mentioned in connection with paragraph 2 might to a certain extent be alleviated if it was expressly indicated in both paragraphs that the action required under paragraphs 1 (a) and 1 (b) was dependent on the operator having received the goods. Any acknowledgement made under paragraph 1 (a) would simply be an acknowledgement of receipt, whereas the acknowledgement of receipt under paragraph 1 (b) also required reference to the condition of the goods.

20. The CHAIRMAN said that the present discussion in the Committee was similar to that which had taken place in the Working Group on International Contract Practices, where the article had been discussed at length. He therefore invited the Committee to proceed to a vote on article 4 (2).

21. Article 4 (2) was approved by 17 votes to 7, with 9 abstentions.

22. Mr. RUSTAND (Sweden) expressed surprise that the Chairman had called for a vote on paragraph 2. As he understood it, the Committee had been waiting for a new proposal from the United Kingdom delegation which would touch upon several of the paragraphs of article 4.

23. Mr. WALL (United Kingdom) said that the Committee should beware of assuming, as the Chairman seemed to have done, that his delegation's search for a way of incorporating some of the ideas in document A/CONF.152/C.1/L.31 into article 4 would have no implications for paragraph 2. He, too, had been surprised that the Chairman had proceeded to a vote on that paragraph. His delegation's new proposal concerning document A/CONF.152/C.1/L.31 would at the very least refer to paragraphs 1 (a) and 1 (b) of article 4. As those subparagraphs were specifically referred to in paragraph 2, the latter would obviously be affected. His intention was not to redraft article 4 completely. He would do his best to reflect the decision made by the Committee on paragraph 2 but reserved his delegation's right to decide, in seeking to reflect document A/CONF.152/C.1/L.31 in article 4, whether or not it wished to propose some consequential amendments to paragraph 2 as well as proposing amendments to paragraph 1. He regarded its freedom to do that as exceptionally important and requested the Chairman to allow him the necessary flexibility to approach the matter with the sense of responsibility which the Chairman himself would wish to exercise.

24. The CHAIRMAN said that he had noted the views of the United Kingdom. The vote on paragraph 2 was maintained with the reservation that there might be an amendment to document A/CONF.152/C.1/L.31.

25. Mr. LAVIÑA (Philippines) said that his delegation had abstained from the vote. Had there been sufficient clarification of paragraph 2, it would have voted in favour of it, but its doubts had not been dispelled, particularly with regard to the issue raised by the representative of Germany.

26. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) said that his delegation had abstained from the vote because it considered that the Committee had been rushed into taking a decision. It nevertheless believed that the difficulties which had arisen could be overcome by suitable efforts.

27. Mr. RUSTAND (Sweden) said that his understanding was that at the previous meeting the Committee had tacitly agreed to await the new proposal for article 4 which the United Kingdom had undertaken to draft. As far as paragraph 2 was concerned, the United Kingdom had expressed doubts about the advisability of including the second sentence in the draft. Bearing in mind the discussion subsequent to that, nobody present could possibly have assumed that the new United Kingdom proposal would not affect paragraph 2. What had occurred at the present meeting had confirmed his impression that the basic text was considered a fait accompli and that any serious attempts at improving it were unnecessary and perhaps even unwelcome.

28. Mr. RAO (India) said that his delegation had abstained from voting. There appeared to have been undue haste in the recourse to a vote. The representative of the United Kingdom had indicated at both the present and the previous meeting that he was working on certain ideas connected with article 4 and a large number of delegations had expressed misgivings about that article. Efforts to reach a consensus in the Committee should not be discouraged, particularly where opinions appeared to be equally divided. He therefore requested the Chairman to be patient with the Committee and where possible to consider setting up small negotiating groups to resolve difficult issues. Had that been done where paragraph 2 was concerned, the negotiations would undoubtedly have produced a consensus at the beginning of the following week.

29. Mr. WALL (United Kingdom) said that, following the vote, he had understood that he would be unable to make a consequential amendment which would involve deleting the second sentence of paragraph 2. As far as he was concerned the decision had been taken to retain that sentence. His attention would now focus on such consequential amendments to paragraph 2 as arose from his attempts to incorporate into paragraph 1 the ideas expressed in document A/CONF.152/C.1/L.31. In the meantime, he referred the Chairman to rule 7 of the rules of procedure which, as applied mutatis mutandis to the Committee, enjoined the Chairman to promote general agreement. All delegations might usefully bear that in mind.

The meeting was suspended at 4.05 p.m. and resumed at 5.15 p.m.

ELECTION OF A VICE-CHAIRMAN AND A RAPPORTEUR (agenda item 2) (continued)

30. Mr. LAVIÑA (Philippines) nominated Mr. Soliman (Egypt) for the post of Vice-Chairman and Mr. Safarian Nematabad (Islamic Republic of Iran) for that of Rapporteur.

31. Mr. Soliman (Egypt) and Mr. Safarian Nematabad (Islamic Republic of Iran) were elected Vice-Chairman and Rapporteur respectively.

The meeting rose at 5.20 p.m.